88-1006

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY LEE JAYNES,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

(1) Whether petitioner's conviction and sentence were premised upon "no evidence" in violation of the Fourteenth Amendment?

Petitioner submits that the Texas Appellate Courts have decided an important question in federal law which is in conflict with applicable decisions of this Court. Rule 17.1(c), Supreme Court Rules.

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OPINIONS BELOW

The opinion of the Court of Appeals, Fourteenth Supreme Judicial District, sitting at Houston, Texas, on direct appeal was unpublished. It is reprinted in the Appendix at A-1, together with the Texas Court of Criminal Appeals' refusal on Petition for Review.

JURISDICTION

The original opinion of the Court of Appeals affirming the cause was issued on August 28, 1987.

A timely Petition for Review was filed in the Texas Court of Criminal Appeals and refused (without written opinion) on October 12, 1988. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner was charged in a single indictment with three different methods of committing theft. Paragraph II claimed that petitioner acquired and exercised control over the ten head of cattle knowing they were stolen by another person, namely, O. D. Clever. Paragraph III claimed that petitioner acquired and exercised control over the ten head of cattle knowing they were stolen by another person whose name is unknown. V.T.C.A., Penal Code § 31.03(a)(b)(2). The State abandoned paragraphs II and III. (R. I. 5, IV. 4), and proceeded to trial on paragraph I, which claimed that petitioner:

> Appropriate[d] by acquiring and otherwise exercising control over property, namely, ten head of cattle, owned by J. D. Jones, hereafter styled the complainant, with the intent to deprive the complainant of the property, and without the effective consent of the complainant. (R. I. 5).

The jury found the petitioner guilty as to paragraph I and assessed his penalty at twelve years confinement and a fine of $4,000. (R. V. 49, VI. 27).

REASONS FOR GRANTING THE WRIT

Petitioner sold ten head of Jones' cattle in Ratcliff, Arkansas on February 13, 1985. (R. IV. 42). Petitioner told Herbert Holloway, a witness for the State, that the cattle were from Coal Hill, Arkansas and belonged to his sister, Mary Morgan, and he had come up from Texas to haul the cattle to sale for her. (R. IV, 47, 48). Holloway suspicioned that the cattle were stolen and notified Frank Russell, Deputy Sheriff, Johnson County, Arkansas. He in turn called a Texas Ranger by the name of J. C. Chamblee. (R. IV. 66). Chamblee called the petitioner who admitted selling cattle in Arkansas in his sister's name and offered to show Chamblee where he had gotten the cattle.

Petitioner told Chamblee that he met a person called O. D. Clever in a bar. Clever asked petitioner if he would like to buy some cattle. Clever took petitioner to the pasture later identified as being owned by the complainant. Clever stated that he had forgotten his keys, so they cut the lock off the gate and head gate. Petitioner and Clever proceeded to load the cattle into a trailer driven by a person named Henry Kerr. Kerr and petitioner drove the cattle to Arkansas. Petitioner, however, was unable to give Chamblee a description of Kerr even though he had spent approximately 30 to 35 hours with him. Petitioner also told Chamblee that while they were loading cows, one of the cows was killed. Clever told petitioner to leave and that he, Clever, would get the cow out of the chute.

Petitioner told Chamblee that he paid $2,000 in cash for the cattle. Chamblee testified that he searched for Clever by looking through the phone book and the

driver's license records and through personal investigation, but never found such a person. (R. IV. 75, et seq.).

At the conclusion of Chamblee's testimony, the State rested. The petitioner also rested.

Paragraph II and III, abandoned by the State, claimed, respectively, that petitioner received the cattle from O. D. Clever or another unknown person knowing they were stolen, a violation of V.T.C.A., Penal Code § 31.03(a) and (b)(2), viz, receiving stolen property. *Long v. State*, 548 S.W.2d 897 (Tex. Cr. App. 1977).

Theft is committed two ways in Texas: (1) appropriating the property from the complainant with the intent to deprive him of the property without his consent; and (2) the property is stolen and the [actor] appropriates the property knowing it was stolen by another. Section 31.03(a) and (b)(1) and (a) and (b)(2), Penal Code.

The only evidence offered at petitioner's trial regarding guilt came through his admissions to Chamblee and Holloway. Those admissions clearly show that petitioner exercised control over the previously stolen cattle knowing they were stolen by O. D. Clever. There was "no evidence" in the record establishing that petitioner, personally or by acting as a party, participated in the initial unlawful appropriation, § 31.03(a) and (b)(1), which is the theory upon which the State proceeded and the jury convicted. *Maxwell v. State*, 628 S.W.2d 773 (Tex. Cr. App. 1981).

Although there may be proof in the record to support petitioner's conviction under receiving stolen property, there is "no evidence" to support his conviction

upon the theory presented by the State and relied upon by the jury, viz, that he participated, either personally or by acting as a party, in the initial unlawful appropriation of the cattle.

Consequently, just as "conviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt. *Thompson v. Louisville,* 362 U.S. 199, 4 L.Ed.2d 654, 80 S. Ct. 624 (1960), U. S. Const. Amend. 14.

CONCLUSION

For the foregoing reasons, Petitioner Larry Lee Jaynes asks that his Petition for Certiorari be GRANTED.

Respectfully submitted,

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APPENDIX

Affirmed and Opinion filed August 28, 1987.

A14-86-160-CR

LARRY LEE JAYNES, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from the 248th District Court
of Harris County
Cause No. 425,565

OPINION

This is an appeal from a conviction for theft of property, enhanced by one prior conviction, for which the jury assessed punishment at imprisonment for twelve years plus a $4,000 fine. In five points of error appellant complains about (1) insufficiency of the evidence; (2) the trial court's refusal to give requested instructions; (3) admission of a pen packet; and (4) the trial court's denial of his motion to quash the indictment. We find no error and, accordingly, affirm the judgment of the court below.

The facts developed at trial demonstrated that on February 13, 1985, J. D. Jones, a cattle rancher (the complainant), was checking his cattle pasture when he discovered that the chain used to lock the gate enclosing

his pasture had been cut. Upon further investigation, he found the lock cut off of the head gate of his loading chute. He also found a dead cow lying in his loading chute and two other cows standing behind the dead cow. He discovered, too, that ten head of his cattle were missing, which he reported to the police, the Harris County Sheriff's Department, and the Texas and Southwestern Cattleman's Association.

Herbert Holloway (Holloway), a part-time employee of the Sheriff's Department of Johnson County, Arkansas, testified that on February 13, 1985, at approximately 10:30 a.m., he attended a cattle auction in Ratcliff, Arkansas during his off-duty hours. While at the auction, he noticed appellant and another man unloading ten cows. He testified that the brand on the cows was the same as the brand used by the complainant. Holloway further noted that the cows did not look like Arkansas cows because "up there we have a lot of colder winters than in the South, and the hair is longer, rougher-looking hair. They've got real long hair and you can't hardly see the brand. The Southern cows are South Cattle and they have slick hair and you can see the brand." He stated that the cows being unloaded by the two men had short, slick hair and that the brand was very visible.

Holloway asked appellant where the cattle had come from. Appellant stated that they were from Coal Hill, Arkansas. He further stated that he was from Texas and that he was selling the cattle for his sister, Mary Morgan. Holloway testified that he knew Mary Morgan and knew that she did not have any place to pasture cattle. He became suspicious and contacted the local sheriff and a member of the Texas and Southwestern Cattleman's Association.

J. C. Chamblee (Chamblee), a Texas ranger, began an investigation of the theft of the complainant's cattle, and appellant's name was given as a possible suspect. Appellant lived approximately five miles from the complainant's property. Chamblee visited appellant and asked him for his side of the story concerning the cattle. Appellant admitted that he had sold some cattle in Arkansas in his sister's name and offered to show Chamblee where he had gotten the cattle. Appellant then took Chamblee to the complainant's pasture.

Appellant told Chamblee that he met a person called O. D. Clever (Clever) in a bar. Clever asked appellant if he would like to buy some cattle. Clever took appellant to the pasture later identified as being owned by the complainant. Clever stated that he had forgotten his keys, so they cut the lock off the gate and the head gate. Appellant and Clever proceeded to load the cattle into a trailer driven by a person named Henry Kerr (Kerr). Kerr and appellant drove the cattle to Arkansas. Appellant, however, was unable to give Chamblee a description of Kerr even though he had spent approximately 30 to 35 hours with Kerr. Appellant also stated to Chamblee that while they were loading the cows, one of the cows was killed. Clever told appellant to leave and that he, Clever, would get the cow out of the shoot (sic)

Appellant told Chamblee that he paid $2,000 in cash for the cattle. Appellant explained he had made the money in tips from cutting hair, and that he kept it in the freezer rolled in foil because he was in trouble with the Internal Revenue Service (IRS) and did not want any record of the money. Appellant also stated that he sold the cows in Arkansas to hide the transaction from

the IRS. Appellant showed Chamblee a handwritten bill of sale that he said came from Clever. The bill of sale was dated Febraury 13, 1985, the same day the cattle were sold in Arkansas.

Chamblee testified that he searched for Clever by looking through the phone book and the driver's license records and through personal investigation, but never found such a person. He also searched for Kerr and believed that he had located Kerr. However, the person Chamblee believed to be Kerr was not named Henry Kerr.

At the conclusion of Chamblee's testimony, the State rested. The defense also rested. The jury subsequently returned a guilty verdict.

In point of error one, appellant contends the evidence is insufficient to prove beyond a reasonable doubt that the explanation he offered to explain his possession of the property, when first confronted, was false. Specifically, appellant argues case law requires the State to prove the falsity of the explanation given by appellant when he was *first confronted* with the fact that the cattle were stolen.[1] Although the record demonstrates that appellant gave two explanations for his possession of the recently stolen property—the explanation given to Holloway[2] and the explanation given to Chamblee[3]—he argues that it

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1. As authority for his argument, appellant relies on *Sanders v. State*, 675 S.W.2d 343 (Tex. App.—Fort Worth 1984), *aff'd*, 707 S.W.2d 78 (Tex. Crim. App. 1986); *McElyea v. State*, 599 S.W.2d 828 (Tex. Crim. App. 1980); *Smith v. State*, 518 S.W.2d 823 (Tex. Crim. App. 1975); and *Huff v. State*, 492 S.W.2d 532 (Tex. Crim. App. 1973).

2. That the cattle were from Coal Hill, Arkansas and that he was selling them for his sister.

3. That he bought the cattle from Clever, the man he believed to be the owner of the cattle.

is the explanation given to Chamblee which the State must have proved was false.

Appellant argues that the explanation given to Holloway was not given in connection with an investigation of stolen property. Further, he argues, "Holloway certainly did not testify that he 'confronted' appellant with the fact that he knew or suspected the cattle were stolen." Appellant concludes that the explanation given to Holloway was not an explanation given *when first confronted* with the fact that the property was stolen.

Instead, appellant argues that the explanation given to Chamblee is the explanation offered by appellant when first confronted with the fact that the cattle were stolen. Thus, he argues that the "Chamblee" explanation is the one which the State was required to prove was false. He further argues that because the State failed to prove that the "Chamblee" explanation was false, the State failed in its burden of proof. Thus he concludes that the evidence is insufficient to sustain his conviction.

Assuming, without deciding, that appellant's contentions are correct concerning the necessity of disproving the explanation offered to Chamblee (as opposed to the one offered to Holloway), we still find appellant's insufficiency argument to be without merit. His argument is based on the assumption that the explanation offered to Chamblee was reasonable. We find, however, that this assumption is unsupported by the record.

The general rule is if the accused is found in possession of recently stolen property and at the time of arrest fails to make a reasonable explanation showing his honest acquisition of the property, the factfinder may draw an inference of guilt. *Hardesty v. State,* 656 S.W.2d 73, 76

(Tex. Crim. App. 1983). However, if the accused offers a reasonable explanation that sufficiently rebuts the circumstance of possession of recently stolen property, the evidence is insufficient to sustain the conviction unless the evidence shows that the explanation was false. *Huff v. State,* 492 S.W.2d 532, 533 (Tex. Crim. App. 1973). In other words, the record must demonstrate that the explanation is either false or unreasonable before the evidence to support the conviction will be deemed sufficient. *Adams v. State,* 552 S.W.2d 812, 815 (Tex. Crim. App. 1977). Further, whether the accused's explanation is reasonable is an issue to be determined by the factfinder. *Id.*

Here, we find that there is support in the record for the jury to conclude that the explanation appellant offered to Chamblee was unreasonable. Appellant's explanation, along with other evidence introduced, included the following facts: (1) the "owner" (Clever) cut the locks off of his own gates because he "forgot" the key; (2) appellant received a bill of sale from the "owner," which was dated February 13, 1985, for purchase of the cattle from a pasture near La Porte, Texas; (3) appellant was then seen in Johnson County, Arkansas with the stolen cattle at 10:30 a.m. on February 13, 1985, the same day as the day he purchased the cattle; (4) appellant was unable to give Chamblee a physical description of Kerr, the man who helped appellant haul the cattle, although appellant had spent 30 to 35 hours with Kerr; and (5) appellant paid for the cattle with $2,000 in cash, which was stored in his freezer. On the basis of these facts, the factfinder could conclude that the explanation appellant offered to Chamblee was unreasonable. Thus, the State had no burden to prove that appellant's explanation was false. *See Adams,* 552 S.W.2d at 815.

Consequently, we find that the State did not fail in its burden of proof and that the evidence is sufficient to sustain appellant's conviction. Point of error one is overruled.

In point of error two, appellant contends that the trial court erred in refusing to give his requested instruction on the law of mistake of fact. He maintains that the testimony pertaining to his explanation of his possession of the cattle showed that he bought the cattle from someone whom he thought was the owner. The fact that that person was not the lawful owner raised the issue of mistake of fact. Because the trial court refused to give his requested instruction on the defense of mistake of fact, appellant concludes that his conviction should be reversed. We disagree.

The record indicates that, although the trial court refused appellant's requested charge on mistake of fact concerning appellant's reasonable belief as to who owned the cattle, it did submit a charge on mistake of fact. The charge submitted by the trial court stated:

> You are further instructed that if you find from the evidence beyond a reasonable doubt that on or about the 13th day of February, 1985, in Harris County, Texas, the defendant exercised control over ten head of cattle owned by J. D. Jones, in that the defendant appropriated by acquiring and otherwise exercising control over the said property, but you also find from the evidence that at the time the defendant took this action he did so with the reasonable belief that he had lawful possession of the said property, or if the prosecution has failed to persuade you beyond a reasonable doubt that these facts are untrue, you will acquit the defendant and say by your verdict "Not Guilty."

When the refused charge is substantially the same as that given by the court, no harm is shown by the trial court's refusal of the requested charge. *Philen v. State,* 683 S.W.2d 440, 445 (Tex. Crim. App. 1984). Here, the refused charge and the submitted charge both focused on appellant's defense of his mistaken belief that he was in lawful possession of the cattle. We find that appellant was not harmed by the trial court's refusal to submit his requested charge. Point of error two is overruled.

In point of error three, appellant argues that the trial court erred in refusing to submit his requested charge on the law of possession of recently stolen property and reasonable explanation thereof. We disagree.

Appellant asked the trial court to submit a charge which provided, in part:

> The law provides that where a defendant is found in possession of recently stolen property and fails to make a reasonable explanation showing his honest acquisition of the property at the time he was first confronted with the fact that cattle were stolen, the factfinder may draw an inference of guilt.

Appellant's requested charge instructed the jury that it could infer guilt if it found certain facts. To instruct a jury that certain facts give rise to an inference of guilt is to improperly comment on the weight of the evidence. *See Browning v. State,* 720 S.W.2d 504 (Tex. Crim. App. 1986); *Roberts v. State,* 672 S.W.2d 570 (Tex. App.—Fort Worth 1984, no pet.). We find that the trial court properly refused to submit appellant's requested charge. Point of error three is overruled.

In point of error four, appellant argues that the record contains no probative evidence to sustain the finding of

true to the enhancement paragraph of the indictment. Specifically, he contends that the pen packet, which was the only evidence offered to show that appellant had a prior conviction for robbery by assault, was not properly authenticated. Included in the pen packet admitted into evidence were the judgment and sentence from appellant's conviction in Texas state court for robbery by assault and the judgments and sentences from appellant's convictions in federal court for unlawful possession of a firearm, bank robbery, and bank robbery by force, violence, and intimidation. Appellant maintains that the judgments and sentences contained in the pen packet are judicial records and, as such, are required to be authenticated pursuant to the provisions of Tex. Rev. Civ. Stat. Ann. art. 3720[4] and 28 U.S.C. § 1738 (1982) prior to their admission. Because these records were not properly authenticated pursuant to these statutes, he contends that his objection to the admission of the pen packet should have been sustained. We disagree.

The judgment and sentence from a Texas state court conviction contained in a pen packet are part of the records of the Texas Department of Corrections; as such, they may be authenticated pursuant to Tex. Rev. Civ. Stat. Ann. art. 3731a.[5] *See Todd v. State,* 598 S.W.2d 286 (Tex. Crim. App. 1980). Further, the judgment and sentence from a federal court conviction contained in a pen packet may be authenticated pursuant to article

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4. Repealed by the Texas Rules of Criminal Evidence, effective September 1, 1986. *See* List of Repealed Statutes in the Texas Rules of Criminal Evidence.

5. Repealed by the Texas Rules of Criminal Evidence, effective September 1, 1986. *See* List of Repealed Statutes in the Texas Rules of Criminal Evidence.

3731a. *See Plaster v. State,* 567 S.W.2d 500 (Tex. Crim. App. 1978).

Here, the pen packet containing the judgments and sentences from appellant's Texas state court and federal court convictions was properly authenticated pursuant to article 3731a. The properly admitted pen packet, in conjunction with the fingerprint testimony tying the record to appellant, constitutes sufficient evidence to prove beyond a reasonable doubt that the enhancement paragraph of the indictment is true. Point of error four is overruled.

In point of error five, appellant argues that the trial court erred in denying his motion to quash the indictment.

In the indictment, appellant was charged with three counts—one count for theft and two counts for receiving stolen property. Prior to trial, the State abandoned the two counts alleging receiving stolen property and proceeded to trial on the first count alleging theft. The indictment upon which the State proceeded to trial stated:

> LARRY LEE JAYNES hereafter styled the Defendant, heretofore on or about February 13, 1985, did then and there unlawfully appropriate by acquiring and otherwise exercising control over property, namely, ten head of cattle, owned by J. D. JONES, hereafter styled the Complainant, with the intent to deprive the Complainant of the property, and without the effective consent of the Complainant.

Prior to trial, appellant filed a motion to quash the indictment, alleging that the offense as charged by the indictment failed to give him sufficient notice of: (1) the means of "unlawfully" as alleged in the indictment; (2)

the method of "acquire" as alleged in the indictment; (3) the particular method of "exercising control" over the property as alleged in the indictment; (4) the means of "intent" as alleged in the indictment; (5) the means of "deprive" as alleged in the indictment; (6) the methods of "ownership" exercised by the complainant as alleged in the indictment; (7) the name, kind, and quality of the "ten head of cattle" as alleged in the indictment, and (8) the type of "effective consent" as alleged in the indictment. On appeal, appellant maintains that the trial court erred in failing to quash the indictment on the grounds asserted in his motion. We disagree.

When determining whether an indictment gave an accused notice adequate to prepare his defense, we apply a three-step test:

> The first step in answering this question is to decide whether the charging instrument failed to convey some requisite item of "notice." If sufficient notice is given, this ends our inquiry. If not, the next step is to decide whether, in the context of the case, this had an impact on the defendant's ability to prepare a defense, and, finally, how great an impact.

Adams v. State, 707 S.W.2d 900, 903 (Tex. Crim. App. 1986).

Here, we find that the indictment gave sufficient notice of the offense with which appellant was charged. First, an allegation of "unlawfully" in an indictment is merely a conclusion encompassing the criminal conduct charged; as used in the indictment, the term is mere surplusage and adds nothing to the indictment. *Guerrero v. State,* 666 S.W.2d 350, 353 (Tex. App.—Corpus Christi 1984, no pet.). Second, the term "effective consent" in an in-

dictment does not need further clarification. *Thomas v. State,* 621 S.W.2d 158, 164 (Tex. Crim. App. 1981) (Opinion on State's Motion for Rehearing). Third, an indictment need not allege the type of ownership exercised by the complainant-owner in order to give an accused sufficient notice of the charge against him; a general allegation of "owner" is sufficient. *Thomas,* 621 S.W.2d at 161. Fourth, an indictment allegation of "intent to deprive" does not require further clarification. *Grice v. State,* 635 S.W.2d 890, 892 (Tex. App.—Dallas 1982, pet. ref'd). Fifth, the name, number, and quality of the "ten head of cattle" is not an appropriate allegation in an indictment; an allegation of number of cattle is sufficient in an indictment. *Cook v. State,* 488 S.W.2d 822, 824 (Tex. Crim. App. 1972).

Finally, with regard to appellant's complaint concerning the terms "acquire" and "exercising control," we find that these indictment allegations required no further clarification. An element of theft is that the accused "appropriate" the property of an owner. *See* Tex. Penal Code Ann. § 31.03 (Vernon Supp. 1987). "Appropriate" has two definitions. *See* Tex. Penal Code Ann. § 31.01(5) (Vernon Supp. 1987). The indictment properly alleged the type of appropriation with which appellant was charged, to-wit: "appropriate by acquiring and otherwise exercising control over property. . . ." *See* Tex. Penal Code Ann. § 31.01(5)(B) (Vernon Supp. 1987). *See also Gorman v. State,* 634 S.W.2d 681, 682-683 (Tex. Crim. App. 1982). A more specific allegation would be evidentiary and, hence, not necessary to fulfill notice requirements. *See, e.g., Thomas,* 621 S.W.2d at 161. The trial court did not abuse its discretion in overruling appellant's motion to quash the indictment because the in-

dictment gave appellant sufficient notice of the offense with which he was charged. Point of error five is overruled.

The judgment of the court below is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed August 28, 1987.

Panel consists of Chief Justice J. Curtiss Brown and Justices Robertson and Cannon.

Do Not Publish. Tex. R. App. P. 90.

Official Notice

Court of Criminal Appeals

RE: Case No. 11-40-87

STYLE: Jaynes, Larry Lee

October 12, 1988

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

COA# A14-86-160-CR Thomas Lowe, Clerk

Court of Criminal Appeals
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